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THE PUZZLE OF INALIENABLE RIGHTS

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The idea of "inalienability" is normally thought of as providing the strongest level of protection that a right (and hence its right-holder) can possibly enjoy. Whereas an "ordinary" fundamental right is supposed to be protected first of all against the State ("vertical" protection), and secondly also against other private citizens and entities in general ("horizontal" protection), some rights are supposed to be so important that they are protected, it seems, even against the choices and decisions of the very right-holder. While the idea of an inalienable right is well known in legal, moral, and political philosophy, it is not entirely clear what it means for a right to be inalienable – and whether an inalienable right is really a right after all. By using a Hohfeldian conceptual framework, this essay tries to provide an analytical inquiry into the concept of an inalienable right, and to explore under what conditions it is conceptually possible to talk of inalienable rights.

I. Introduction

An inalienable right is a right that – in addition to being "inviolable" by anyone else – cannot even be waived, sacrificed, or otherwise renounced by the right-holder. Whoever holds an inalienable right cannot divest himself of the titularity of the right and cannot renounce the benefits that the right secures, or promises to secure, to him. It is widely accepted that some, or even most, of the fundamental rights proclaimed by contemporary constitutional democracies are just like that.

Indeed, "inalienability" is normally thought of as the strongest level of protection that a right (and hence its right-holder) can possibly enjoy: whereas an "ordinary" fundamental right is supposed to be protected first of all against the State ("vertical" protection), and secondly also against other private citizens and entities in general ("horizontal" protection), some particular rights are supposed to be so important that they are protected, it seems, even against the choices and decisions of the very right-holder. Whereas all fundamental rights cannot be violated[1] by the State and/or by other fellow citizens, some fundamental rights cannot be violated also by the right-holder himself. An inalienable right is, then, the most inviolable among fundamental rights.

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1 Of course, "cannot", here, really means "should not" – it refers to a normative rather than to a factual impossibility.

A right can be made inalienable for several reasons: reasons pertaining to the full agency (or lack thereof) of the right-holder (*eg*, minors, incapacitated persons), or pertaining to conditions of social or economic vulnerability of certain classes of right-holders. And certain rights are deemed so important, so integral to our conception of a human being, or to our idea of a decent society (*eg*, the right to vote, the right to personal dignity), that we want to rule out the possibility that people may even divest themselves of those rights, not even voluntarily.

All of the above is almost common sense, at least for jurists that operate in the framework of contemporary constitutional democracies. As I have already hinted, it is almost taken for granted that at least some rights are inalienable in this sense. And yet, I think that the matter deserves closer scrutiny. Indeed, in the contemporary jurisprudential debate, it has already been acknowledged that some theories of rights cannot easily accommodate inalienable rights. Famously, the "Will (or Choice) Theory" of rights seems to lack the conceptual resources to make sense of inalienable rights, while the rival "Interest Theory" of rights seems comfortably capable to do so – and this is often presented as a mark of the superiority of the latter over the former as a theory of rights[2].

Still, it may be the case that the notion of an inalienable right is somewhat problematic also for the Interest Theory of rights – *ie*, it may be the case that, also within the framework of an Interest Theory of rights, the notion of an inalienable right can create some interesting and puzzling conceptual tensions. For this reason, I want to raise and explore the following connected questions: "what, exactly, is an inalienable right?", and "can a right really be inalienable?".

I will proceed as follows. I will begin by laying down the relevant conceptual apparatus, which by and large follows a Hohfeldian approach to the analysis of rights (Part II). This will provide a theoretical framework in order to make sense of the notion of inalienable rights (Parts III–V). Finally, I will put forward some tentative thoughts on how the topic of inalienable rights bears on the debate between the Interest Theory of rights and the Will Theory of rights (Part VI).

Before delving into the analysis of the notion of inalienable rights, two quick preliminary clarifications are in order.

First, the questions I will explore in this essay should be understood as conceptual questions, as opposed to normative questions. I am not interested here in the question of whether it is a good idea to incorporate inalienable rights in a legal system, or if inalienable rights unacceptably impair the autonomy of the right-holder, or if the idea of an inalienable right is compromised with some unpalatable form of moral paternalism, and some such. Rather, the point I will be concerned with in this essay is whether there is something "out of place", from a conceptual point of view, in the idea of an inalienable right: is the notion of an inalienable right a well-formed one?

Second, in this work, I will be dealing only with legal rights. While there is some discussion on inalienable rights in moral and political philosophy, I will leave aside the question of whether the analysis that I will develop here applies to moral rights as well as to legal rights.

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[2] See *infra* Part VI, for some references to this particular angle of the Interest Theory/Will Theory debate.

II. Approaching Rights

In order to pave the way to my analysis of the concept of inalienable rights, I will use a conceptual apparatus that builds upon Hohfeld's analytical framework of fundamental legal positions, occasionally developing or modifying it here and there.

So, here is Hohfeld's well-known analytical framework[3]. The main idea is that rights-talk can be usefully analysed and disambiguated by breaking down the concept of "right" into four basic normative positions: claim, liberty, power, and immunity. Each such position signals one single and very specific way in which it is possible to have a right – one single (and indeed minimal) sense in which the term "right" can figure in rights-talk[4].

What is distinctive of Hohfeld's approach is that every position in terms of rights (claim, liberty, power, immunity) can be defined only by reference to a certain correlative position, which is *normally*[5] imputable to a different subject – whenever a right-holder has a "right" position, somebody else will necessarily have a certain correlative position.

More precisely:

(a) if A has a (right which is a) *claim* (*eg*, a right to receive a certain amount of money from B), then B has a corresponding *duty* towards A (the duty to give A that amount of money);

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[3] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23(1) Yale LJ 16 [Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning"]; Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26(8) Yale LJ 710. Some useful primers to Hohfeld's analysis of rights: Alf Ross, *On Law and Justice* (Oxford: Oxford University Press, 2020) at 195–202; John Finnis, "Rights: Their Logic Restated" in John Finnis, *Philosophy of Law: Collected Essays Volume IV* (Oxford: Oxford University Press, 2011) at 375–388 [Finnis, "Rights: Their Logic Restated"]; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 199–202; Joel Feinberg, *Social Philosophy* (Englewood Cliffs, New Jersey: Prentice-Hall, 1973) at 55–59; Jeremy Waldron, "Introduction" in Jeremy Waldron, ed. *Theories of Rights* (Oxford: Oxford University Press, 1984) at 5–8; Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010) ch 4; Matthew Kramer, "Rights without Trimmings" in Matthew Kramer, Nigel Simmonds & Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998) at 7–60, 101–111 [Kramer, "Rights without Trimmings"]; Bruno Celano, "I diritti nella jurisprudence anglosassone contemporanea. Da Hart a Raz" in Paolo Comanducci & Riccardo Guastini, eds. *Analisi e diritto 2001. Ricerche di giurisprudenza analitica* (Torino: Giappichelli, 2002) at 1–58; William Edmundson, *An Introduction to Rights* (Cambridge, Cambridge University Press, 2004) ch 5; Giorgio Pino, *Diritti e interpretazione* (Bologna: Il Mulino, 2010) ch 4; Riccardo Guastini, *La sintassi del diritto* (Torino: Giappichelli, 2011) at 92–98; Luís Duarte d'Almeida, "Fundamental Legal Concepts: The Hohfeldian Framework" (2016) 11(10) Philosophy Compass 554 [Duarte d'Almeida].

[4] To be sure, Hohfeld thought that only claims are "rights in the strict sense", whereas liberties, powers and immunities are rights only in a generic and imprecise sense (Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *supra* note 3 at 30, 36). But I will follow, here, the usage of referring to each of these positions as "rights" (Carl Wellman, *A Theory of Rights* (Totowa, New Jersey: Rowman & Allanheld, 1985) [Wellman]; George W Rainbolt, "Rights Theory" (2006) 1(1) Philosophy Compass 11 [Rainbolt]).

[5] This qualification is very important for the argument of this essay, and it will be further explored below (see (5), in this part). For simplicity's sake, for the time being I will not repeat it again.

(b) if A has a (right which is a) *liberty* (*eg*, a right to do X), then B does *not have a right* against A (specifically, B does not have a right that A does not do X);
(c) if A has a (right which is a) *power*, then B has a *liability* towards A – which means that B is exposed to those changes in his normative positions that are the consequence of the exercise of A's power; and
(d) if A has a (right which is an) *immunity* towards B, then B has a *disability* towards A – which means that it is impossible for B to change some (or even all) of A's normative positions.

The following table summarises the standard Hohfeldian analytical framework.

Right	**Correlative**	**Opposite**
claim	duty	no-right
liberty	no-right (not to)	duty (not to)
power	liability	disability
immunity	disability	liability

A few important glosses are in order here.

(1) Each Hohfeldian position falling in the "Right" column entertains a relation of logical (conceptual, definitional…) entailment with a specific position falling in the "Correlative" column (of course this refers to positions that are in the same row, above): *if* there is a given position of the "Right" kind, *then* by definition (by conceptual necessity) there is also a certain position of the "Correlative" kind (and *vice versa*). By contrast, a position in the "Opposite" column is obtained by the negation of a certain position in the "Right" column – a right and its opposite are logical contradictories. A position in the "Opposite" column basically signals the absence of a position in the "Right" column[6]. In short, the relations between the different Hohfeldian positions are strictly logical (conceptual, definitional) relations, as opposed to empirical, justificatory or normative relations. By the same token, such logical (and hence necessary) relations obtain *only* between positions that belong to *the same row* of the above table: no logical (and hence necessary) relation obtains between positions that belong to different rows. This means that if X has, *eg*, a liberty to ϕ, this logically implies that Y does not have the right that X does not ϕ, but at the same time it is not necessarily the case that Y also has a duty to respect X's ϕ-ing, or to help X to ϕ. And so on.

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[6] There is some discussion on whether the absence of a right ("no right") and the negation of a right ("no-right") really amount to exactly the same thing, or if they rather consist in different situations. I will leave this point unexplored here, as it is immaterial for my present concerns. For further references to this debate, see Heidi M Hurd & Michael S Moore, "The Hohfeldian Analysis of Rights" (2018) 63(2) Am J Juris 295; Matthew Kramer, "On No-Rights and No Rights" (2019) 64(2) Am J Juris 213; Andrew Halpin, "No-Right and its Correlative" (2020) 65 Am J Juris 147; Andrew Halpin, "On Kno-rights and No-rights" (2022) 46 Revus; Mark McBride, "The Dual Reality of No-Rights" (2021) 66(1) Am J Juris 39.

(2) Claims and liberties refer to actions or omissions – the satisfaction of a claim and the exercise of a liberty require that some action is either taken or omitted. Powers and immunities, on the other hand, refer to changes in normative positions: the exercise of a power results in creating, modifying or extinguishing some normative position, while the enjoyment of an immunity results in the impossibility to create, modify or extinguish some normative position[7].

(3) The *content* of a Hohfeldian position is the action, the omission, or the normative position, that is deontically referenced by that Hohfeldian position (and hence also by its correlative). Better said, the content of a Hohfeldian position is a certain state of affairs that, when actual, makes it possible to say that the right in question has been exercised, enjoyed, fulfilled or satisfied. If I have a right to a state of affairs X, and X obtains, then my right has been satisfied (exercised, enjoyed, fulfilled). Accordingly:

  (i) if A has a *claim* to the payment of an amount of money by B (which entails B's duty to pay that amount of money to A), the content of the claim is the payment of that amount of money – when B pays that amount of money to A, the (claim-)right at stake is satisfied;

  (ii) if A has a *liberty* to walk in the park (which entails that B does not have the claim that A does not walk in the park), the content of A's liberty is that A walks in the park; if A walks in the park, she is exercising that liberty;

  (iii) if A has the *power* to fire B (which entails B's liability to be fired by A), the content of the power is the termination of that employment relation; in terminating that employment relation, A is exercising the power in question; or,

  (iv) if A has an *immunity* against B as regards being fired for political reasons (which entails B's lack of power to fire A for political reasons), the content of the immunity is the impossibility that A's employment is terminated for political reasons; in so far as A's employment relation cannot be terminated by B for political reasons, A is enjoying the immunity in question.

(4) Liberties and powers are "active" positions: they can be *exercised*, through an action, an omission, or a normative change that is effectuated by the right-holder. (Such action, omission, or normative change is indeed the content of the right.) Claims and immunities, by contrast, are "passive" positions: their content is an action or omission that somebody else is bound to take (in the case of claims), or a normative change that somebody else is unable to bring about (in the case of immunities). In principle, the right-holder of a passive right does not have to do anything in order to receive the benefit or protection secured by the right in question. Accordingly, claims and immunities cannot be "exercised" – they can only be *enjoyed* or *satisfied*.

(5) "First order" Hohfeldian positions (claims and liberties) are necessarily relations between *different* individuals – A's claim will necessarily correlate

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[7] This difference among Hohfeldian positions is often rendered with a distinction between "first order" positions (claims and liberties) and "second order" positions (powers and immunities).

to B's duty, and A's liberty will necessarily correlate to B's no-right[8]. "Second order" Hohfeldian positions (powers and immunities), on the other hand, can logically be held "against oneself", as it were. There is nothing conceptually odd in the possibility to create, modify or extinguish one's own normative positions (a power towards oneself), as well as in the lack of such possibility (an immunity against oneself).

(6) Strictly speaking, a single Hohfeldian position only entails its correlative position, and nothing more. A Hohfeldian right is simply that – an "atomic" position. But, what we normally call "a right" in standard juristic parlance rarely consists in just one such position. A "workable", "meaningful" right is normally richer than that – it consists of a bundle or cluster of many Hohfeldian positions. Rights, then, normally present themselves as more or less complex molecules, composed by many atomic Hohfeldian positions ("cluster-rights"). When understood as cluster-rights, rights are internally complex entities: their structure typically consists in a central area (the "core" of the right), which includes the most important Hohfeldian positions that in a sense *define* the right itself (take away those central positions, and that right will disappear); and in a "protective perimeter", which includes other Hohfeldian positions that are supposed to protect or to facilitate the exercise or enjoyment of the core – typically, an immunity against the divestment of the core positions, a power to seek judicial sanction against violations of the right, a claim to non-interference towards the enjoyment of the core rights, and so on.

(7) Hohfeldian positions can be nested one in the other. This is already obvious in the case of powers, which are "second order" positions whose function is to change other normative positions – a power necessarily refers to other normative positions. But also in the case of other Hohfeldian positions, it is possible that the content of the right is another such position. For instance, a right-holder can have a liberty (normally, a bilateral liberty) to exercise a power, or a claim that somebody else exercises (or does not exercise) a power, and so on.

(8) Any given Hohfeldian position (in the "Right" column) is *necessary*, but not *sufficient*, for a right to exist. For the Will Theory of rights, for instance, a claim counts as a right only if it is accompanied by some form of control by the right-holder on the performance of the correlative duty – and this control, in turn, has the form of Hohfeldian powers and liberties. Accordingly, for the Will Theory of rights, a claim counts as a right only when conjoined with at least a power and a liberty (or, more frequently, with a more or less complex set of powers and liberties). For the Interest Theory of rights, on the other hand, a Hohfeldian position counts as a right only if that position typically serves an interest of the holder of that position. For instance, the condition of a slave includes several immunities – his normative condition cannot be changed under many respects (arguably, a slave cannot inherit,

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[8] See Finnis, "Rights: Their Logic Restated", *supra* note 3 at 378; Duarte d'Almeida, *supra* note 3 at 556; Glanville Williams, "The Concept of Legal Liberty" (1956) 56(8) Colum L Rev 1129 at 1138, 1144–1145.

cannot receive donations, cannot become a citizen), but such immunities cannot count as rights because they hardly serve an interest of the slave. By the same token, a power counts as a right only if the relevant change in normative positions that the power brings about is in the interest of the power-holder (I can change other people's normative positions by harming them, for instance, but this hardly counts as the exercise of a right of mine).

III. Alienable and Inalienable Rights

I will use the analytical framework introduced in the previous part, in the footsteps of Hohfeld, in order to make sense of the idea of an inalienable right. As it turns out, there is some ambiguity in the notion of "inalienable right" (as well as in the notion of "alienable right", as we will see shortly), and a Hohfeldian framework can prove useful in order to avoid some confusion.

In order to get there, I will first analyse the notion of an alienable right in the light of the conceptual apparatus introduced so far, and then I will move on to the domain of inalienable rights.

So, what does an *alienable* right look like? What does it mean to relinquish, waive, forfeit, renounce, or extinguish one's rights? Some basic distinctions are necessary here.

For one thing, "alienability" (the possibility to relinquish, waive, forfeit, renounce, extinguish, *etc*, a right) may refer to the *possession* of the right – to the right itself, to the right as such. With this kind of alienability, in other words, the *holding* of the right is at stake. An alienable right, in this sense, is a right that, at a certain point, may cease to be held by the right-holder, in virtue of a decision of the right-holder himself[9]. In Hohfeldian terms, this means that the right-holder has the power (or, better said, the bilateral liberty to exercise the power) to "extinguish" the core of the right. Such an "extinction", in Hohfeldian terms, is, of course, the transformation of whatever position is in the core of the right into its opposite. If the right-holder has an alienable right (*ie*, alienable in *this* sense), he has the power to constitutively operate a logical negation on whatever positions are in the core of the right – and hence he has the power to transform those positions into their opposite. Accordingly, the holder of an alienable claim-right has the power to transform it into a no-right, the holder of an alienable liberty-right has the power to transform it into a duty (a duty not to do the same action that is the content of the liberty), and so on (see the Hohfeldian table in Part II above).

On the other hand, "alienability" can refer to the *content* of the right in question. In *this* sense the holder of an alienable right, while still "nominally" holding the right in question, may decide not to exercise, or enjoy, or secure the satisfaction of the right, or he can even decide to commit himself not to exercise or enjoy the right. In such cases, the right-holder renounces the benefits or protections (or some of the

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[9] A right can obviously cease to exist or to pertain to the right-holder also as a consequence of decisions of third parties (the State, or other subjects endowed with the relevant power), as well as of objective states of affairs (*eg*, the death of the right-holder, the passing of a certain amount of time). Such cases, of course, are not relevant for the matter of the "alienability" of a right.

benefits or protections) that that right would secure to him, while at the same time still "having" the right in question.

In Hohfeldian terms, this second sense of "alienability" can be represented in a number of ways. For instance, the right-holder may have the power (or, better said, the bilateral liberty to exercise the power) to "extinguish" (*ie*, to negate) some of the positions that are in the protective perimeter of the right; may have a liberty not to engage in activities that would lead to the satisfaction of the right (such as urging or demanding that the duty-bearer fulfils her duty); may have the liberty not to react (*eg*, by taking legal action) against the non-compliance of the duty-bearer; may have the power to waive his right to sue in court for violations of his right; and so on.

By the same token, the *inalienability* of a right can refer either to the possession of the right, or to the content of the right. Let's see.

1. A right can be inalienable in the sense that its very *possession* cannot be extinguished or waived by the right-holder: the holder of such an inalienable right cannot terminate, by his own decision, his possession of the right in question. This means that the right-holder of an inalienable right, in *this* sense, does not have a power (*ie*, he has a disability) to extinguish the position or positions that sit at the core of the right[10].
2. A right can be inalienable in the sense that its *content* cannot be extinguished, renounced, or waived by the right-holder. In *this* sense, the right-holder of an inalienable right cannot fail to exercise or enjoy the right in question. Generally speaking, this means that the right-holder cannot extinguish, or otherwise fail to exercise, those normative positions that constitute the protective perimeter of the right and that are conducive or instrumental to the exercise or enjoyment of the right. For instance, the holder of an inalienable claim-right (inalienable in *this* sense) cannot refuse (*ie*, does not have the liberty to refuse) the correlative performance by the duty-bearer; or, he does not have the liberty not to bring an action against the non-performance of the duty; and so on. The term "mandatory right"[11] seems particularly apt to describe a right that is inalienable in this sense – a right that *must* be exercised or enjoyed.

In order to further highlight the difference between these two senses of inalienability, we can make the examples of two rights that – where recognised by the law – are normally conceived of as inalienable rights: the right to minimum wage, and the right to be given maternity leave.

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[10] A further distinction can be made here, between a "strong inalienability", which is the one described in the text (*ie*, the lack of power to extinguish the core of the right); and a "weak inalienability", which allows for such a power, but combined with a lack of liberty to exercise it (hence, a duty not to exercise that power). The difference between strong and weak inalienability becomes salient in relation to the consequences of a purported act of forfeiture of the right by the right-holder. In the case of strong inalienability, the act of forfeiture is non-existing, since the right-holder does not have the right to forfeit the right. In the case of weak inalienability, the act of forfeiture is in principle valid, but the right-holder may still enjoy some legal protections and remedies (*eg*, non-enforceability, monetary compensation) in order to mitigate or cancel the effects of the act.

[11] This term is used, for example, by Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life" (1978) 7(2) Philosophy and Public Affairs 93 at 104, and Terrance McConnell, *Inalienable Rights* (New York: Oxford University Press, 2000) at 12.

If the right to minimum wage is inalienable in the sense 1, this means that the employee does not have the power to extinguish his claim-right to receive a salary that is not lower than the legally prescribed threshold (the employee does not have the power to cancel the employer's duty to pay him that kind of salary). On the other hand, if the right to minimum wage is inalienable in the sense 2, this means that the employee does not have the liberty to accept a salary that is lower than the legally mandated threshold, and possibly he does not have the liberty not to sue the employer who pays a salary that is lower than the legally mandated threshold.

The right to be given maternity leave is, in Hohfeldian terms, the claim-right of an employee to be given absence from work for a certain amount of time, in the proximity of the period when she is supposed to give birth. If the right is inalienable in the sense 1, this means that the employee does not have the power to extinguish her claim-right to be given maternity leave. On the other hand, if the right is inalienable in the sense 2, this means that the employee does not have the liberty not to apply for the maternity leave, or to refuse to go on maternity leave anyway (even if the right itself has not been waived), and possibly even no liberty to refuse to react against the employer who refuses to grant the maternity leave or otherwise interferes with the enjoyment of the right[12].

The distinction between inalienability-1 and inalienability-2 is relevant for at least two reasons. First, and trivially, these two forms of inalienability are different in character – in the two cases, inalienability concerns two different areas of the right, as it were.

Second, and more interestingly, inalienability-1 and inalienability-2 are *separable*, in the sense that, in principle, a given right could be inalienable in the first sense (regarding its possession) while not being inalienable also in the second sense (regarding its exercise or enjoyment), or the other way round (of course, it is also possible that a given right is inalienable in both senses at the same time)[13].

IV. Zooming in on Inalienable Rights

Let's take stock. We have seen that it is conceptually possible for a right to be inalienable, and what this involves under a Hohfeldian analytical framework. More precisely, the analysis in the previous part has shown that there are at least two senses in which a right can be inalienable – namely, inalienable as to the *possession* of the right (inalienability-1), and inalienable as to the *exercise* or *enjoyment* of the right (inalienability-2).

So far so good. But at this point things start looking a bit puzzling. Indeed, we could legitimately ask, "is an inalienable right still a right?". Let's see why.

On the one hand, inalienability-1 involves a lack of power, *ie*, a disability, which is literally the opposite (the logical negation) of a power, and hence the opposite

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[12] I am assuming, in this example, that an employee is put on maternity leave pursuant to a decision of the employer – a decision that, of course, the employer has a duty to take under the relevant circumstances. In such cases, the employee has a claim right that the employer takes the decision – *ie*, exercises the power – in question.

[13] As a matter of fact, since inalienability-2 affords a more stringent protection to the right in question than inalienability-1, it would be quite odd for a right to be inalienable only as to its exercise/enjoyment (inalienability-2) and not also as to its possession (inalienability-1).

of a right (the opposite of that specific kind of right that is a power). The fact that we are calling a "right" something that is indeed the opposite of a right is already a bit strange, but this oddity can be somewhat balanced, or overcome, by the fact that what is at stake here is a disability (a lack of power) that the right-holder has *towards himself* (the right-holder of an inalienable-1 right does not have the power to change one or more of his rights): as a consequence the right-holder in question has, at the same time, an *immunity towards himself* – and an immunity is, of course, a kind of right. So, it seems that we are in a kind of half-full-half-empty-glass situation here: the right-holder of an inalienable-1 right can be described, at the same time, either as having an immunity (which is indeed a right), or as having a disability (which is the opposite of a right), towards himself.

On the other hand, even more perplexing is the conceptual structure of inalienability-2, which is basically the lack of a liberty (or possibly the lack of a rich array of liberties) to abstain from exercising or enjoying the right in question. And, of course, the opposite of a liberty is nothing but a duty.

More precisely, the holder of an inalienable *claim-right*[14] (in so far as it is inalienable-2) actually has a duty to accept the performance which is the content of the claim, because he has no liberty to refuse that performance. Possibly, the right-holder in question even has a duty to insist on receiving the performance, to react against the duty-bearer's failure to carry out the required performance, and so on, because if he fails to do so (to insist on receiving the performance, *etc*) the right will not be satisfied – and, being inalienable-2, the right in question *has* to be satisfied. In short, the right-holder has no choice but to enjoy the right. And, since as a matter of fact (albeit not as a matter of conceptual necessity) inalienability-2 often goes hand in hand also with inalienability-1, the right-holder will not even be in the position to voluntarily extinguish the claim in question.

Something similar – but slightly more complicated – will apply also to the holder of an inalienable-2 *liberty-right*[15]. To begin with, if the right in question is a "unilateral liberty", the right-holder has, in virtue of such a right, the possibility[16] *only* to ϕ (in the case of a "positive" liberty) or, alternatively, the possibility *only* not to ϕ (in the case of a "negative" liberty). This situation, *per se*, already resembles very closely something like an inalienable-2 right, since the right-holder of a (positive) unilateral liberty to ϕ does not also have the liberty not to ϕ, as much as the right-holder of a (negative) unilateral liberty not to ϕ does not also have the liberty to ϕ[17]. In short, the right-holder of an inalienable unilateral positive liberty cannot but perform the action which is the content of the right, and hence has indeed a *duty* to perform the action that is the content of the right; and the right-holder of an inalienable unilateral negative liberty cannot but abstain from performing the action which

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[14] By this I mean a cluster-right (see Part II at (6)) whose core is constituted at least by a claim.

[15] Again, this should be understood as a cluster-right whose core is constituted at least by a liberty.

[16] The possibility to ϕ assured by a liberty-right means that A's ϕ-ing is not forbidden, and hence that B does not have a (claim-)right that A does not ϕ.

[17] Remember that, in Hohfeldian terms, a positive liberty does not entail a negative liberty, and *vice versa* (see Part II at (6)). The only thing that is entailed a positive liberty is the correlative absence of a right not to do the action which is the content of the right, and the only thing that is entailed by a negative liberty is the correlative absence of a right to do the action which is the content of the right (see Part II at (1) and (6)).

is the content of the right, and hence has indeed a *duty* to refrain from performing the action that is the content of the right.

Fortunately, such an odd situation is quite rare, if at all conceivable, because when we encounter a "liberty" in rights-talk, what is normally at stake is a "bilateral liberty" – a liberty that is at the same time positive and negative. The holder of a bilateral liberty exercises his right not merely by ϕ-ing or by refraining from ϕ-ing – but rather by *choosing* whether to ϕ or to refrain from ϕ-ing. Now, how can a bilateral liberty be inalienable-2? Well, if a bilateral liberty to ϕ is basically a liberty to choose whether to ϕ or not to ϕ, and if the right-holder of an inalienable-2 right cannot abstain from exercising the right in question, then the right-holder of an inalienable-2 bilateral liberty cannot voluntarily put himself in the position of not exercising the choice that is the content of the right. Hence the right-holder will have, among other things, a duty to react against interferences on his liberty, and a disability (a lack of power) to release others[18] from their duty of non-interference, or to commit not to react against such interferences.

In other words, once we analyse more closely the idea of an inalienable right (specifically in the sense of inalienability-2), and we look into its components, we find that the right-holder of an inalienable right is actually surrounded by duties, to the effect that he *has to* enjoy the right (in the case of claim-rights), or that he *has to* react against interferences on his exercise of the right (in the case of liberty-rights).

It should be noted that what happens in such cases is not merely that a right generates also some duties on the right-bearer. This would not be strange in the least – after all, the holder of a property right has, as a matter of course, some duties just because of that property right (the duty to pay some taxes, the duty to insure one's car, *etc*). But here, and especially in the case of inalienable-2 rights, the situation is qualitatively different: here, the right-holder has duties that concern the very exercise/enjoyment of the right, as opposed to duties that are merely consequences of having some right. Such duties are not merely a contingent consequence of having the right, but rather are constitutive of that right as an inalienable right (in the sense of inalienable-2).

Now all this – namely, the fact that in such situations rights and duties come to coexist – is logically consistent. But is it still reasonable to describe such situations in terms of "a right"? How can we make sense of all this, and reconcile the analysis of rights with the widespread intuition that there are inalienable rights (and that they deserve to be called "rights" anyway)?

V. Making Sense of Inalienable Rights

I think that, ultimately, there are two main ways to make theoretical sense of inalienable rights.

The first possibility is that inalienable rights are indeed rights, even if – as cluster-rights – they include also some or even many duties that fall upon the right-holder himself. In order to say this, we probably need to introduce some

[18] For instance, through some contractual clause.

adjustments in the vocabulary of rights derived from the Hohfeldian framework, to the effect that such vocabulary will include not only the positions in the left column of the Hohfeldian table (see Part II), but also the ones, or at least some of the ones, that figure in the other two columns – duties in the first place. Indeed, and independently from the matter of inalienable rights, in the theoretical literature on rights there is already some effort in this direction – for instance, it has been suggested that a "liability" could actually count as a right, rather than as the "opposite" of a right (*ie*, the opposite of an immunity)[19]. And some tentative – and avowedly inconclusive – proposal has been explored also about the possibility of including also duties *in* the concept of rights[20]. But in the end such attempts run counter to a widely held assumption, both in philosophy and in common sense, that while rights and duties are strictly interconnected concepts (just as much as the concepts of "father" and "son"), a duty is not a right, and *vice versa*.

The second possibility is that an inalienable right, if it is to count as a right, can be inalienable only as to its possession, and not as to its enjoyment/exercise. A right can only be inalienable-1, not also inalienable-2. While in the case of inalienability-2 it does not make sense to talk of a right, because the right-holder is actually surrounded by duties, in the case of inalienability-1 the right-holder has a lack of power towards himself (he does not have the power to extinguish the right) and this lack of power also counts as an immunity (which is a right). The right-holder of an inalienable-1 right does not have a duty to exercise or enjoy the right. An inalienable-2 right, on the other hand, is actually no right at all – it is a set of duties in disguise[21]. The assertion that an inalienable-2 right is a "right" is indeed a category mistake – a persuasive definition, a rhetorical move to refer (covertly) to some *duties* instead. Of course it is easy to understand how such a rhetorical move can be tempting: while having a right is normally considered as a good thing for the right-holder, having a duty is somewhat burdensome for the duty-bearer. So, if what is actually a duty is called a right instead, this can certainly make it easier for the duty-bearer to accept it. And such a terminological shift (from "duty" to "right") has an apparent plausibility, because the duties in question are somewhat beneficial to the duty-bearer – such as in the case of the duties attached to an inalienable right to health, to an inalienable right to education, to an inalienable right to bodily integrity, *etc*.

This second possibility to make sense of inalienable rights, I suggest, makes it possible to articulate the notion of inalienable rights in a non-paradoxical way – there is nothing particularly strange in a right whose possession is inalienable, while at the same time the right-holder maintains the choice as to how – and if – to

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[19] Something like this has been argued by Rowan Cruft, "Rights: Beyond Interest Theory and Will Theory?" (2004) 23(4) Law & Phil 347 at 358–359, Rainbolt, *supra* note 4 at 34–39 (from the standpoint of the Interest Theory of rights), as well as by Wellman, *supra* note 4 at 93–94, 206–207 (from the standpoint of the Will Theory of rights). For a critical appraisal of such proposals, see David Frydrych, "Rights Modelling" (2017) 30(1) Can JL & Jur 125 at 143–146.

[20] See Rowan Cruft, "Why Aren't Duties Rights?" (2006) 56(223) The Philosophical Quarterly 175.

[21] James W Nickel, "Are Human Rights Utopian?" (1982) 11 Philosophy & Public Affairs 246 at 254 [Nickel] (observing that the idea that human rights can neither be permanently given up nor temporarily waived amounts to the claim that "one must keep and use on every possible opportunity all of one's human rights").

exercise/enjoy it. Moreover, this kind of explanation makes sense of the fact that many rights that we normally deem inalienable (the right to privacy, the right to freedom of expression, and probably the right to life itself) in fact allow for some forms of alienability – they are inalienable-1 but not also inalienable-2 – the inalienable right to privacy does not preclude the possibility to give interviews or to write autobiographical memoirs, precisely because it is inalienable in sense 1 and not also in sense 2.

VI. Inalienable Rights and Theories of Rights

The notion of inalienable rights has sometimes been used as a test-case for theories of rights[22].

Notoriously, inalienable rights are problematic for the Will Theory of rights (the theory according to which a right protects a range of free choice of the right-holder). Some supporters of the Will Theory of rights have indeed conceded that their theory is not conceptually equipped to account for inalienable rights, and hence that it suffers from a potential limitation as a *general* theory of rights[23], while others have tried to show that, appearances notwithstanding, and with some adjustments, the Will Theory of rights can accommodate also inalienable rights[24]; and still other Will theorists have expressly claimed that, for conceptual reasons, no right can be inalienable[25].

On the other hand, the Interest Theory of rights (the theory according to which rights protect an interest, *ie*, an aspect of the well-being of the right-holder) happily acknowledges that some rights are inalienable – inalienable rights are those rights that protect a particularly important interest of the right-holder, an interest so important that not even the right-holder is entitled to dispose of the right. The ability to account for inalienable rights is often considered as marking a theoretical advantage of the Interest Theory over the Will Theory. Still, it has sometimes been noted that Interest theorists also have reasons to be wary of inalienable rights, because they can easily act as a Trojan horse in order to let paternalism into the citadel of legal and moral rights. Moreover, inalienable rights can indeed be puzzling also for the Interest Theory of rights. In fact, for the Interest Theory, a right is something that secures an interest of the right-holder. But if, as it happens, an interest of the right-holder is secured by a duty, or a set of duties, on what ground can we not describe this situation (the situation in which A's duty is there in order to protect one of A's interests) as "a right"? This is exactly the case with inalienable rights: an inalienable right secures an interest of the right-holder – and typically an interest of paramount importance at that; and, at least in the case of inalienability-2, the way in

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22 Neil MacCormick, "Rights in Legislation" in Peter Michael Stephan Hacker & Joseph Raz, eds. *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977) at 198–209; Kramer, "Rights without Trimmings", *supra* note 3 at 73.

23 H L A Hart, "Legal Rights" in H L A Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: Oxford University Press, 1982) at 162–193.

24 Nigel Simmonds, "Rights at the Cutting Edge" in Matthew Kramer, Nigel Simmonds & Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998) at 113–232.

25 Hillel Steiner, "Directed Duties and Inalienable Rights" (2012) 123(2) Ethics 230.

which an inalienable right secures the underlying interest is actually by surrounding it with a set of duties (as we have seen, an inalienable-2 right is basically comprised by a set of duties). Evidently, even for an Interest Theory of rights, this situation creates the discomforting effect of leaving us without a principled way to distinguish rights from duties.

Personally, I tend to favour the Interest Theory (or some version of it) as the preferable theoretical account to make sense of the concept of right, even if it is not my intention to defend and develop, here, a complete and comprehensive version of the Interest Theory of rights. I only want to highlight that, in my opinion, any credible version of the Interest Theory of rights should incorporate the conceptual caveat that I have tried to isolate in this essay – namely, that inalienable rights are rights whose possession, as opposed to their exercise/enjoyment, is inalienable. If a right is inalienable as to its possession (inalienable-1), and not also as to its enjoyment/exercise (inalienable-2), we remain squarely within the province of rights properly understood, which blocks the puzzling conclusion of calling a set of duties "a right".

The argument that I have tried to develop in this essay is a conceptual, not a normative, one. I have tried to show that it is conceptually awry to talk of inalienable rights, if inalienability refers to the exercise/enjoyment of the right (inalienability-2). A right-holder who has no possibility to avoid or refuse the performance that is the content of the right is best seen as a duty-bearer rather than as a right-holder. Of course, it is entirely possible that such a duty (or collection of duties) is in the interest of the duty-bearer himself – interests can certainly ground duties as well as rights. The point is that, in such cases, we should resist calling this "a right", when what is really at stake is a duty. Resisting the temptation to call "a right" everything that is in the interest of a subject, or even everything that may be positively valued, may indeed be quite a healthy exercise.

To be sure, imposing a duty on someone in his own interest is something that may arouse suspicions of paternalism – not a very palatable moral stance, at least from a liberal point of view[26]. Presenting a paternalistic intervention as the attribution of a right, rather than as the imposition of a duty, may be a confusing way to provide that intervention with a *prima facie* legitimacy (rights are good, duties are burdensome). Granted, it may not be the case that inalienable rights invariably involve paternalistic considerations (for instance, behind an inalienable right there may be a convergence between an individual and a "public" or collective interest, as in the case of the inalienable right to vote), or that all forms of paternalistic intervention are equally objectionable from a moral point of view. At any rate, it is true that an interest can be protected in many different ways, and attributing a right (a Hohfeldian position, or a cluster of such positions) is just one of them. Paternalistically, people's interests could be protected by imposing duties, or prohibitions, upon them. In such cases, some form of moral vigilance, or of criticism of the law, is in order – and dissolving the conceptual confusions that one finds along the way may be an important step in this direction.

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[26] Nickel, *supra* note 21 at 254 (pointing to the "paternalistic overtones" of the idea of inalienable human rights).